NO. 20-7732
IN THE SUPREME COURT OF THE UNITED STATES

TINA LASONYA BROWN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

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Capital Case

QUESTIONS PRESENTED

ONE: Whether the Sixth Amendment prohibits harmless error analysis in a case involving an error under *Hurst v. Florida*.

TWO: Whether the Eighth Amendment requires jury sentencing in capital cases.

THREE: Whether, because the lower court receded from a decision that misinterpreted this Court's decision in *Hurst v. Florida*, Petitioner's death sentence violates the Due Process Clause of the Fourteenth Amendment.

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OPINION BELOW

Petitioner challenges the Florida Supreme Court's decision to affirm the denial of her motion for postconviction relief; that decision appears as *Brown v. State*, 304 So.3d 243 (Fla. 2020). The Florida Supreme Court's direct appeal decision appears as *Brown v. State*, 143 So.3d 392 (Fla. 2014), *cert. denied*, *Brown v. Florida*, 574 U.S. 1034 (2014).

JURISDICTION

This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. However, this Court should decline to exercise jurisdiction in this case because the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a court of appeal of the United States, and does not conflict with relevant decisions of this Court. Sup. Ct. R. 10. No compelling

reasons exist in this case and this Petition for a writ of certiorari should be denied. Sup. Ct. R. 10.

STATEMENT OF THE CASE AND FACTS

By Petitioner's own admission, the uncontroverted evidence "established a crime out of [a] nightmare." Petition, p.2. Petitioner and her co-defendants (which included Petitioner's teenage daughter and another woman) lured the victim into Petitioner's home, tased and beat the victim, dragged the victim to Petitioner's car, drove the victim to a remote location, dragged the victim out of the car, chased down the victim when she tried to escape, beat her with a crowbar, doused her with gasoline, and lit her on fire. *See Brown*, 143 So.3d at 395-97; *see also Brown*, 304 So.3d at 251-53. The victim suffered severe head trauma, her jaw was either broken or severely dislocated, and over ninety percent of her body was burned. *Brown*, 143 So.3d at 396. While the victim was burning alive, one of the co-defendants screamed "Burn, bitch! Burn!" *Id.* The victim initially survived her injuries and walked about a third of a mile to a nearby residence. *Id.* The victim identified Petitioner as one of her attackers and asked the Emergency Medical Technician who treated her to "protect her children." *Id.* at 396-97. The victim then died sixteen days later in a hospital. *Id.* at 397.

A jury convicted Petitioner of first-degree murder and recommended a death sentence by a unanimous vote. *Brown*, 143 So.3d at 397, 400. The trial court found three statutory aggravating factors: (1) that the murder was committed in a cold, calculated, and premeditated (CCP) manner without any pretense of moral or legal

justification; (2) that the murder was especially heinous, atrocious, and cruel (HAC); and (3) that the murder was committed while the Petitioner was engaged in the commission of a kidnapping. *See id.* at 405. On appeal, the Supreme Court of Florida affirmed Petitioner's conviction and sentence. *Id.* at 408.

Subsequently, Petitioner filed an initial motion for postconviction relief, which included a claim for relief under *Hurst v. Florida*, 577 U.S. 92 (2016). *See Brown*, 304 So.3d at 256, 277. The trial court denied the motion. *Id.* at 256. On appeal, Petitioner's challenge to the trial court's denial of the motion for postconviction relief included a challenge to the denial of the *Hurst v. Florida* claim. *Id.* Following state law precedent[1] that applies *Hurst v. Florida* retroactively to cases that became final after *Ring v. Arizona*, 536 U.S. 584 (2002), the Court examined the evidence and found harmless any Sixth Amendment sentencing error in Petitioner's case. *See Brown*, 304 So.3d at 278:

> At trial, the State argued that Brown was guilty of first-degree murder under both premeditated and felony murder theories and presented uncontroverted evidence that the capital felony was committed while Brown was engaged, or was an accomplice, in the commission of a kidnapping. Any jury that found, based on the State's presentation, that Brown was guilty of first-degree murder could not have logically concluded that Brown was not also guilty of kidnapping, whether as the primary aggressor or an accomplice. Accordingly, we hold that, under the circumstances of this case, there is no reasonable doubt that a "rational jury," properly instructed, would have found beyond a reasonable doubt the existence of the statutory aggravating circumstance that the capital murder was committed while Brown was engaged in the commission of a kidnapping. *Galindez v. State*, 955 So.2d 517, 522 (Fla. 2007) (quoting *Neder v. United States*, 527 U.S. 1, 19

[1] Petitioner concedes this point. *See* Petition, p.8 ("Applying state retroactivity doctrines, the Florida Supreme Court held in [*Mosley v. State*, 209 So.3d 1248 (Fla. 2016),] that inmates whose death sentences were not yet final on June 24, 2002 were entitled to resentencing under *Hurst v. Florida* and [*Hurst v. State*, 202 So.3d 40 (Fla. 2016)].").

> (1999)); see also *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986). Because the existence of a single statutory aggravating circumstance would render Brown eligible for imposition of the death penalty, *see* [*State v. Poole*, 297 So.3d 487, 501-03 (Fla. 2020)], it is unnecessary to address any of the other statutory aggravators found by the trial court to conclude that the sentencing error in Brown's case is harmless.

Ultimately, the Supreme Court of Florida affirmed the denial of all of Petitioner's postconviction claims. *Id.* at 280.

REASONS FOR DENYING THE WRIT

I.

The Florida Supreme Court's Rejection of Petitioner's *Hurst* Claim on the Basis of Harmlessness Does Not Conflict with any of this Court's Precedent or Present an Important or Unsettled Question for Review

Petitioner asks this Court to address whether the Sixth Amendment prohibits an appellate court from conducting harmless error analysis in a case involving an alleged error under *Hurst v. Florida*. *See* Petition, p.13 (Characterizing the Supreme Court of Florida's harmless error analysis as "upholding a death sentence unsupported by any responsible jury finding of the facts necessary to make a defendant's crime death-eligible."); *see also Hurst*, 577 U.S. at 98-99 (Florida's capital sentencing scheme, under which an advisory jury makes a recommendation to a judge, and the judge makes the critical findings needed for imposition of a death sentence, violates the Sixth Amendment right to jury trial). Ostensibly, Petitioner asserts conflict with this Court's precedents; in reality, however, she seeks only a fact-based review of the harmless error review conducted by the lower state court. The correctness of the finding of harmlessness is a factual determination with no

implications beyond the parties involved in this case, mandating the denial of certiorari review. *See Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Moreover, the sufficiency of the Florida Supreme Court's harmless error analysis is established by a review of that opinion.

Before this Court even reaches the question of harmlessness, it would first have to address the predicate question of retroactivity. Unacknowledged by Petitioner, *Hurst v. Florida* does not apply retroactively to her case for two reasons: first, Petitioner's conviction became final before *Hurst v. Florida* was decided; and second, Petitioner raised her *Hurst* claim in postconviction. *See McKinney v. Arizona*, 140 S.Ct. 702, 708 (2020):

> The hurdle is that McKinney's case became final on direct review in 1996, long before *Ring* [*v. Arizona*, 536 U.S. 584 (2002),] and *Hurst*[*v. Florida*, 577 U.S. 92 (2016)]. *Ring* and *Hurst* do not apply retroactively on collateral review. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). Because this case comes to us on state collateral review, *Ring* and *Hurst* do not apply.

Because *Hurst v. Florida* does not apply retroactively to Petitioner's case under federal law, any review of a state court's harmless error analysis "would be a prohibited and pointless exercise." *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1338 (11th Cir. 2019), *cert. denied*, *Knight v. Fla. Dep't of Corr.*, 141 S.Ct. 274 (2020):

> Where, as here, *Teague* [*v. Lane*, 489 U.S. 288 (1989),] bars relief before we reach the preliminary question of whether constitutional error occurred at all, consideration of the secondary question of whether any

> such error was harmless would be a prohibited and pointless exercise for both the petitioner and this Court. We therefore cannot grant Knight relief on his *Hurst* claim, whether or not it is cloaked in the garb of harmless error.

Even if *Hurst v. Florida* were to apply, this Court has clearly held that appellate courts can continue to conduct harmless error analyses in cases involving Sixth Amendment violations like the one alleged in Petitioner's case. *See, e.g.*, *Hurst*, 577 U.S. at 102:

> Finally, we do not reach the State's assertion that any error was harmless. *See Neder v. United States*, 527 U.S. 1, 18-19 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. *See Ring*[*v. Arizona*], 536 U.S.[584], 609, n.7 [(2002)].

By finding that a rational jury, properly instructed, would have found the fact of kidnapping as an aggravating circumstance, the Supreme Court of Florida followed this Court's caselaw and conducted an appropriate harmless error analysis in Petitioner's case.

Petitioner's Claim and Sub-Claims

In support of her overall argument under Question One, Petitioner raises several claims and sub-claims: a *Hurst* claim; a sub-claim that *Almendarez-Torres*, 523 U.S. 224 (1998), is no longer good law; a *Caldwell v. Mississippi*, 472 U.S. 320 (1985), sub-claim; and an apparent sub-claim that *Schad v. Arizona*, 501 U.S. 624 (1991), is no longer good law. Respondent addresses each of these below.[2]

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[2] In her Initial Brief before the Supreme Court of Florida, Petitioner only challenged the denial of her *Hurst* claim. *See* Initial Brief, p.118 ("There is no dispute that Ms. Brown's death sentence was obtained in violation of the United States Constitution for the reasons described in *Hurst v.*

Petitioner's *Hurst* Claim

Petitioner claims that the Supreme Court of Florida, when it conducted a harmless error analysis in her postconviction appeal, violated her Sixth Amendment rights by finding a "suppositious" kidnapping felony that retroactively made her eligible to receive a sentence of death. Petition, p.14; *see also id.* at 16 ("[The] jury never made a decisive determination of the factual predicate which the Florida Supreme Court has not retrospectively rested her death-eligibility.").

According to Petitioner, the Court relied on harmless error analysis to "constructively" find an aggravating circumstance based upon what the Court believed "a 'rational jury,' properly instructed, would have found." Petition, p.13, quoting *Brown*, 304 So.3d at 278. Petitioner claims that, because no actual jury made that finding, the Court's suppositious finding violated the Sixth Amendment. *See* Petition, p.14 ("Tina Brown now stands slated for execution on the sole ground of a death-eligibility decision based on a factual finding made only by judges, not jurors.").

Florida...."). While Petitioner did raise a *Caldwell* sub-claim, it was different than the one she now raises. *See* Initial Brief, p.124 ("[The] Court's total reliance on the advisory jury's recommendation [in conducting its harmless error analysis under *Hurst v. State*] without considering the jury's diminished sense of responsibility for the death sentence violated *Caldwell* ... [because] no court can be certain beyond a reasonable doubt that a jury would have made the same unanimous *recommendation* absent the *Hurst* error.") (emphasis in original); *see also* Petition, p.11 ("[Petitioner] appealed and filed her brief in the Florida Supreme Court in 2019 relying on the Sixth and Fourteenth Amendments as explicated in *Hurst v. Florida* and *Caldwell v. Mississippi* ... to challenge the notion that a 12-0 [sentencing recommendation from the jury] renders *Hurst* error harmless."). Petitioner glosses over this fact by asserting that her motion for rehearing "raised all of the federal constitutional objections to this ruling which are presented in the current petition for certiorari, fleshing them out in essentially the same terms as the following REASONS section." Petition, p.13. Under state rules, however, a motion for rehearing cannot raise issues or arguments that were not raised in the initial brief. *See* Fla. R. App. P. 9.330(a)(2)(A). Therefore, Petitioner failed to present to the Supreme Court of Florida any claim other than her *Hurst claim*. *See Street v. New York*, 394 U.S. 576 (1969).

In a larger sense, Petitioner condemns harmless error analysis as a "*post hoc* fact-construction [that] is plainly at odds with the Sixth Amendment restrictions placed upon judicial fact-finding...." Petition, p.15. In support of this characterization, Petitioner relies on two cases from this Court that address what facts, if any, a judge may infer from a prior conviction resulting from a guilty plea. *See id.* at 15-16, quoting *Mathis v. United States*, 136 S.Ct. 2243, 2252 (2016), and *Shepard v. United States*, 544 U.S. 13, 25-26 (2005). Neither case[3,4] supports Petitioner's argument, however, because harmless error analysis relies upon evidence actually presented to the jury in a particular case. Therefore, both *Mathis* and *Shepard* remain inapposite.

Furthermore, *Hurst v. Florida* does not apply retroactively to Petitioner's case under federal law. *See McKinney*, 140 S.Ct. at 708. Even if *Hurst* were to apply, Petitioner fails to recognize this Court has already held that Sixth Amendment violations like the one alleged in her case remain subject to harmless error analysis

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[3] In *Mathis*, the parties agreed that the elements of Iowa's burglary statute were broader than the generic burglary definition under the Armed Career Criminal Act's (ACCA) "violent felony" provision. *See Mathis*, 136 S.Ct. at 2250. Whereas the generic burglary offense under the ACCA requires unlawful entry into a "building or other structure," Iowa's burglary statute covers "any building, structure, *[or] land, water, or air vehicle*." *Id.* (emphasis in original) (citations omitted). Because a guilty plea under Iowa's burglary statute could encompass behavior not covered under the ACCA, defendant's Iowa convictions could not support a 15-year mandatory minimum sentence. *See id.* at 2257 ("Because the elements of Iowa's burglary law are broader than those of generic burglary, Mathis's convictions under that law cannot give rise to an ACCA sentence.").

[4] In *Shepard*, this Court addressed whether a sentencing court could look to police reports or complaint applications to determine whether an earlier guilty plea admits, and therefore supports a conviction for, generic burglary under the ACCA. *Shepard*, 544 U.S. 13. This Court answered that question in the negative, holding that

> enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.

Id. at 26.

on appeal. *See, e.g.*, *Washington v. Recuenco*, 548 U.S. 212, 220 (2006) (prosecution's failure to prove the sentencing factor of "armed with a firearm" to the jury beyond a reasonable doubt was a Sixth Amendment violation subject to harmless error analysis on appeal); *see also Ring*, 536 U.S. at 609 n.7 ("We do not reach the State's assertion that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict. *See Neder v. United States*, 527 U.S. 1, 25 (1999) (this Court ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance).").

Additionally, Petitioner fails to acknowledge that, in the *Hurst* decision itself, this Court left it up to the state to decide whether any Sixth Amendment violation qualifies as harmless in a particular case. *See Hurst*, 577 U.S. at 102:

> Finally, we do not reach the State's assertion that any error was harmless. See *Neder v. United States*, 527 U.S. 1, 18-19 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. *See Ring*[*v. Arizona*], 536 U.S.[584], 609, n.7 [(2002)].

That is exactly what the Supreme Court of Florida did in this case, concluding that the evidence supported a finding by a rational jury that Petitioner committed a kidnapping during the course of the murder. *See Brown*, 304 So.3d at 278. Even if this Court disagrees with the Supreme Court of Florida's assessment of the kidnapping evidence, any Sixth Amendment sentencing error remains harmless as the evidence of HAC was still overwhelming. *See Brown*, 143 So. 3d at 401-02 ("The trial court concluded that the aggravating circumstances outweighed the mitigating

circumstances and noted that this case, 'particularly because of the heinous, atrocious, [or] cruel nature of the murder of Audreanna Zimmerman, falls into the class of murders for which the death penalty is reserved.'"). Indeed, Petitioner and her co-defendants burned the victim alive. *Id.* at 396. Because all of the evidence referenced by the Court was presented to the actual jury in Petitioner's case, any failure by the jury to find an aggravating circumstance was harmless under *Neder*.

Recently, this Court cited *Ring* and *Hurst* to reaffirm that, under the Sixth Amendment, "a jury must find the aggravating circumstance that makes the defendant death eligible." *McKinney*, 140 S.Ct. at 707. In *McKinney*, this Court addressed an Eighth Amendment claim based upon *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *See McKinney*, 140 S.Ct. at 707. Specifically, the defendant claimed that the sentencer in his capital trial committed an *Eddings* error by failing to consider the mitigating impact of his post-traumatic stress disorder (PTSD). *See id.* at 706, citing *Eddings* ("In *Eddings*, this Court held that a capital sentencer may not refuse as a matter of law to consider relevant mitigating evidence."). The defendant argued that, in the wake of *Ring* and *Hurst*, a state appellate court could no longer correct an *Eddings* error by conducting a *Clemons* reweighing — i.e., an appellate court judicially reweighing the aggravating factors and mitigating circumstances (which now included the PTSD). *Id.* at 706-07, citing *Clemons v. Mississippi*, 494 U.S. 738 (1990).

In reaching its decision, this Court analogized a *Clemons* reweighing to a harmless error analysis. *See McKinney*, 140 S.Ct. at 706 ("The Court explained that

a *Clemons* reweighing is not a resentencing but instead is akin to harmless-error review in that both may be conducted by an appellate court."). Additionally, this Court clearly and unequivocally rejected the defendant's argument that "appellate courts may no longer reweigh aggravating and mitigating circumstances in determining whether to uphold a death sentence." *Id.* at 707. Furthermore, this Court squarely rejected any argument that the Constitution requires a jury to weigh aggravating factors and mitigating circumstances. *See id.* ("[I]n a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range."). Ultimately, this Court confirmed the continued validity of *Clemons* post-*Hurst*. *See id.* ("In short, a *Clemons* reweighing is a permissible remedy for an *Eddings* error.").

As the above cases clearly indicate, appellate courts can still conduct harmless error analyses in cases involving Sixth Amendment violations — to include *Hurst* violations in Florida. By finding that a rational jury, properly instructed, would have found the fact of kidnapping as an aggravating circumstance, the Supreme Court of Florida followed this Court's caselaw and conducted an appropriate harmless error analysis in Petitioner's case.

Petitioner's *Almendarez-Torres* Sub-Claim

Petitioner argues that "the only way to square" the Supreme Court of Florida's harmless error analysis in *Brown* with the holding of *Hurst v. Florida*, "is to assume

that *Almendarez-Torres* ... survives *Hurst*...." Petition, p.14. According to Petitioner, *Alemendarez-Torres* does not. *Id.*

Alternatively, Petitioner argues that the Supreme Court of Florida's purported application of *Almendarez-Torres* to a contemporaneous, as opposed to a prior, felony conviction "is an aberration" that must be corrected. Petition, p.19. According to Petitioner, a jury finding of a contemporaneous felony during the guilt phase should not serve as the automatic finding of an aggravating factor for the penalty phase. *See* Petition, p.10 ("[I]n the case of any condemned inmate seeking *Hurst*-based relief from a death sentence imposed before *Poole*, such relief becomes automatically barred if a jury at the guilt stage had made any factual finding which *coincided* with one of the statutory aggravators...."') (emphasis added); *see also id.* at 12 ("*Poole*'s new rule that any jury guilt-stage finding of facts that were *coincidental* with a statutory aggravator precludes *Hurst*-based relief...."') (emphasis added).

In raising this sub-claim, Petitioner fails to acknowledge that, after *Hurst* was decided, this Court reaffirmed its commitment to *Almendarez-Torres*. *See United States v. Haymond*, 139 S.Ct. 2369, 2377 n.3 (2019), citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000) ("The Court has recognized two narrow exceptions to *Apprendi*'s general rule, neither of which is implicated here: Prosecutors need not prove to a jury the fact of a defendant's prior conviction, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), or facts that affect whether a defendant with multiple sentences serves them concurrently or consecutively, *Oregon v. Ice*, 555 U.S. 160 (2009).").

Additionally, Petitioner fails to recognize that the *Almendarez-Torres* exception applies to prior convictions, not contemporaneous ones. *See Ring*, 536 U.S. at 597 n.4 (2002) ("No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres* ... which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence."). Whether the conviction is prior or contemporaneous, no Sixth Amendment error occurs because a jury has satisfied the fact-finding requirement. *See generally Ring*, 536 U.S. at 612-13 (Scalia, J., concurring) ("Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase."); *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013), citing *Almendarez-Torres* (prior convictions are "a narrow exception" to the Sixth Amendment requirement that defendants have a right to have a jury find facts which expose a defendant to a greater punishment).

Within the context of *Almendarez-Torres*, some might not see any meaningful distinction between a prior conviction and contemporaneous one. In both scenarios, jury fact-finding supports an increase in the maximum sentence — just at different times. With a contemporaneous conviction, any Sixth Amendment requirement in the penalty phase was satisfied by the jury verdict in the guilt phase; with a prior conviction, any Sixth Amendment requirement in the present case was satisfied by the verdict in the prior case (because the defendant either admitted to the facts or

because the jury verdict itself provides the necessary fact-finding). *See generally Jones v. United States*, 526 U.S. 227, 249 (1999) ("[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."). Under this view, and as to the fact of prior conviction only, the previous jury essentially serves as a substitute for the present one.

Regardless of any distinction between prior convictions and contemporaneous ones, however, Petitioner fails to recognize that the Supreme Court of Florida did not rely on the *Almendarez-Torres* exception to find a "suppositious felony" conviction that rendered any *Hurst* error harmless. In other words, the Court did not look to a prior or contemporaneous felony conviction in order to show that no Sixth Amendment error occurred. Rather, presuming that a Sixth Amendment violation did occur because *Hurst v. Florida* was considered retroactive under state law, the Court properly applied an evidence-based harmless error test and concluded that, because of the "uncontroverted evidence that the capital felony was committed while Brown was engaged, or was an accomplice, in the commission of a kidnapping," any Sixth Amendment error that did occur was nevertheless harmless. *Brown*, 304 So.3d at 278.

Ultimately, Petitioner fails to acknowledge that *Almendarez-Torres* has no application where, as here, an appellate court performs a harmless error analysis.

The harmless error analysis below does not conflict with any of this Court's precedent; nor does it present a conflict of opinion among lower appellate courts.

Petitioner's *Caldwell* Sub-Claim

Petitioner claims that the harmless error analysis conducted by the Supreme Court of Florida retroactively invalidated the jury instructions in her case, thereby resulting in a *Caldwell* violation. *See* Petition, pp.16-17. According to Petitioner, an *ex post facto* violation of *Caldwell* occurred because the jury instructions were rendered inaccurate by a "thing done afterward" — i.e., the harmless error analysis conducted during Petitioner's postconviction appeal. *See Doe #1 v. Lee*, No. 3:16-CV-02862, 2021 WL 428967, at *1 n.4 (M.D. Tenn. Feb. 8, 2021) ("The Latin phrase 'ex post facto' means 'from a thing done afterward.'").

Arguing that the jury instructions "improperly described the role assigned to the jury by local law," Petitioner claims that the "guilt-stage verdict of [her] jury ... [1] which the jury was led to believe would do no more than initiate a second, sentencing state of the trial [2] has now — a decade later — been converted ... into an automatic, stand-alone basis for death eligibility." Petition, p.19 n.36, quoting *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994); *id.* at 19-20. Essentially, Petitioner argues that the instructions exaggerated the impact of the jury's sentencing recommendation on the judicial decision to impose a death sentence.

Again, this case would present an inappropriate vehicle to address instructional error because *Hurst* is not retroactive under federal law. Further, in a footnote under a separate heading, Petitioner acknowledges the jury's unanimous

sentencing recommendation. *See* Petition, p.27 n.46 ("It is true, of course, that Ms. Brown's jury did render a unanimous advisory recommendation of death."). However, Petitioner discredits the role of that recommendation in the sentencing process. *See id.* ("[T]hat recommendation is not the basis upon which Ms. Brown is now slated to be killed."). Failing to acknowledge that *Hurst v. Florida* is not retroactive under federal law, Petitioner asserts that "[h]er 2012 death sentence following [the unanimous jury] recommendation was invalidated by *Hurst v. Florida*...." *Id.* According to Petitioner, that recommendation is gone; all that remains is her conviction. *Id.* Hence, Petitioner argues that her death sentence is based solely upon the jury verdict and the unconstitutional finding of an aggravating circumstance by an appellate court.

In raising her *Caldwell* sub-claim, however, Petitioner fails to demonstrate that the jury instructions "improperly described the role assigned to the jury by local law." *Romano*, 512 U.S. at 9, quoting *Dugger v. Adams*, 489 U.S. 401, 407 (1989) ("Thus, '[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.'"). The jury, as instructed,[5] did provide the trial court with a sentencing recommendation. *See Brown*, 304 So.3d at 255, citing *Brown*, 143 So.3d at 400 ("Following the penalty-phase presentation, the jury unanimously recommended a

[5] See Record on Appeal, Vol. XI, p.1111 ("[T]he law requires you to render an advisory sentence as to which punishment should be imposed – life imprisonment without the possibility of parole or the death penalty. Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose.").

sentence of death."). And the trial court, after receiving that recommendation, did impose a death sentence. *See id.* ("Thereafter, the trial court followed the jury's recommendation and sentenced Brown to death, finding that the aggravating circumstances outweighed the mitigating circumstances."). Nothing in Petitioner's postconviction appeal changed any of that.

In arguing to the contrary, Petitioner fails to acknowledge the process that produced the result she now challenges. Simplifying it for the sake of argument, that process included four key steps. First, the jury unanimously found Petitioner guilty of first-degree murder. *See Brown*, 143 So.3d at 400. Second, the jury unanimously recommended a death sentence. *Id.* Third, based upon the verdict and recommendation, the trial court imposed the death penalty. *Id.* And fourth, based upon its own harmless error analysis, the appellate court denied Petitioner's postconviction *Hurst* claim. *See Brown*, 304 So.3d at 278. Each step in the process led to the next step, until the process concluded with step four. Without any of the first three steps, the fourth step would have been impossible; and, no step in the process erased any step that came before it. Because the first three steps were necessary to the overall process, the appellate court's harmless error analysis in step four did not convert the verdict "into an automatic, stand-alone basis for death eligibility"; nor did that analysis render the verdict, on its own, sufficient "to make the defendant death-eligible." To accept Petitioner's argument would remove any opportunity for harmless error analysis in any case involving a *Hurst* violation. *But see Hurst*, 577 U.S. at 102.

Finally, Petitioner fails to explain how a purported exaggeration of the jury's role in the sentencing process could result in an Eighth Amendment violation under *Caldwell*. An important point, Petitioner does not argue that the instructions, when given, minimized the jury's role in a way that manipulated the jury into recommending a harsher sentence than it would have otherwise. *See Romano*, 512 U.S. at 9 ("The evidence at issue was neither false *at the time* it was admitted, nor did it even pertain to the jury's role in the sentencing process.") (emphasis added); *cf. Feldman v. Thaler*, 695 F.3d 372, 384 (5th Cir. 2012), citing *Beck v. Alabama*, 447 U.S. 625, 642-43 (1980) (Describing "the *Beck* dilemma—that a jury might be coerced into returning an erroneous guilty verdict on a capital crime merely to avoid setting the defendant free" when state law precludes an instruction on a lesser included offense.). In other words, Petitioner does not argue that the jury was "led to believe that responsibility for determining the appropriateness of a death sentence rest[ed] not with the jury but with the appellate court which later review[ed] the case." *Caldwell*, 472 U.S. at 323. If anything, Petitioner argues the opposite — that the jury was led to believe that it enjoyed greater responsibility for determining the appropriateness of a death sentence than it actually possessed because, unknown to the jury at the time the instructions were given, an appellate court would later exercise that role exclusively. But this does not a *Caldwell* claim make. In Petitioner's case, nothing in the jury instructions minimized the jury's sentencing role

in a way that manipulated the process to produce a harsher result.[6] Therefore, no *Caldwell* violation occurred.

Petitioner's *Schad* Sub-Claim

Petitioner appears to argue that this Court's decision in *Schad* is no longer good law. *See* Petition, p.15 ("This is quite simply the classic case in which every precedent of this Court forbids an appellate court to attribute a jury's verdict one of the two alternate findings upon which jurors had been told that they could rest a criminal conviction."); ***but see Schad***, 501 U.S. at 629 (Conviction of first-degree murder under instructions that did not require jury to agree on one of alternative theories of premeditated and felony-murder did not deny due process; the moral disparity between the theories did not bar treating them as alternative means to satisfy mental element of single offense.).

As a general rule, this Court does not overrule itself *sub silentio*. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority sub silentio."); *see also* Carissa Byrne Hessick, William W. Berry III, *Sixth Amendment Sentencing After Hurst*, 66 UCLA L. Rev. 448, 463 n.81 (2019) ("The Court does not require juror unanimity on alternative elements, *see Schad v. Arizona*, 501 U.S. 624 (1991), and although that rule has been criticized, *see* Jessica A. Roth, *Alternative Elements*, 59

[6] This Court has repeatedly rejected certiorari review of *Hurst* induced *Caldwell* claims from Florida. *See, e.g., Jones v. State*, 256 So.3d 801 (Fla. 2018), *cert. denied, Jones v. Florida*, 139 S.Ct. 1341 (2019) (No. 18-7248); *Reynolds v. State*, 251 So.3d 811 (Fla. 2018), *cert. denied, Reynolds v. Florida*, 139 S.Ct. 27 (2018); *Middleton v. State*, 220 So.3d 1152 (Fla. 2017), *cert. denied, Middleton v. Florida*, 138 S.Ct. 829 (2018); *Philmore v. State*, 234 So.3d 567 (Fla. 2018), *cert. denied, Philmore v. Florida*, 139 S.Ct. 478 (2018).

UCLA L. Rev. 170, 190 n.67 (2011) (collecting sources), there is no reason to think that the Court would have overruled its previous case on point without mentioning the issue at all.").

Nevertheless, in a footnote, Petitioner relies upon two cases from this Court to support her claim that a single jury verdict cannot support two, alternative theories of conviction. *See* Petition, p.15 n.30, quoting *Stromberg v. California*, 283 U.S. 359, 367-68 (1931), and *Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942); *but see Griffin v. United States*, 502 U.S. 46, 53 (1991) ("This language, and the holding of *Stromberg*, do not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground."); *but see also Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008) ("An instructional error arising in the context of multiple theories of guilt no more vitiates *all* the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted.") (emphasis in original).

Despite the clear inapplicability of either *Stromberg* or *Williams*, Petitioner claims that the Supreme Court of Florida's harmless error analysis improperly relied upon evidence of kidnapping as an aggravating circumstance. According to Petitioner, the Court could have relied on the evidence of kidnapping to support an aggravating circumstance only if the State had pursued first-degree felony murder as its exclusive theory of the case. *See* Petition, p.14 ("If the prosecution's first-degree charge had been submitted to the guilt-stage jury solely on a kidnap murder theory,

then it might be true that a guilty verdict by a rational jury would support an inference that the jury found a kidnapping beyond a reasonable doubt.").

In making this argument, Petitioner appears to conflate kidnapping as an element of first-degree felony murder with kidnapping as an aggravating circumstance for first-degree murder (whether felony or premeditated). Absent any *Enmund*[7]/*Tison*[8] concerns (which are not present here), a conviction for first-degree felony murder plus at least one aggravating circumstance or a conviction for first-degree premeditated murder plus at least one aggravating circumstance would render a defendant eligible to receive a death sentence. *See generally Sattazahn v. Pennsylvania*, 537 U.S. 101, 112-13 (2003) (discussing murder plus at least one aggravating circumstance); *see also McKinney*, 140 S.Ct. at 705 ("Under this Court's precedents, a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found.").

In Petitioner's case, evidence of kidnapping played a role in the Court's harmless error analysis regarding the penalty phase. Because Petitioner's guilt as to first-degree murder is not in question, and because the Court viewed the evidence of kidnapping in the context of an aggravating circumstance, any distinction between felony murder and premeditated murder in the guilt phase remains wholly irrelevant.

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[7] *Enmund v. Florida*, 458 U.S. 782 (1982).
[8] *Tison v. Arizona*, 481 U.S. 137 (1987).

Ultimately, Petitioner failed to demonstrate that the Florida Supreme Court's harmless error review was inconsistent with any decision from this Court. Consequently, granting review to reassess the lower court's harmless error review would have no impact beyond the interests of the parties to this case. *See Rudolph v. United States*, 370 U.S. 269, 270 (1962) (recognizing that a certiorari petition predicated on reviewing facts of importance only "to the litigants themselves" was an inappropriate grounds to grant a writ). Furthermore, a review of the Florida Supreme Court's opinion establishes the correctness of its harmlessness finding under the facts of this case. *See Barclay v. Florida*, 463 U.S. 939, 958 (1983) (wherein this Court recognized that the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless).

II.

The Eighth Amendment Does Not Require Jury Sentencing

Petitioner asks this Court to address whether the Eighth Amendment requires jury sentencing in capital cases. Just last year, however, this Court clearly answered that question in the negative. *See McKinney*, 140 S.Ct. at 707 ("Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the

ultimate sentencing decision within the relevant sentencing range."). Therefore, this Court need not revisit it.[9]

The Constitution provides a right to trial by jury, not to sentencing by jury. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). In any event, Petitioner's case would be a very poor vehicle to address this question because the jury recommendation for death was unanimous and the evidence of aggravation is overwhelming.

[9] In Florida, the jury actively participates in both the eligibility and selection phases of the capital sentencing process. While the finding of at least one aggravating factor beyond a reasonable doubt concludes the jury's role in the eligibility phase, it marks the beginning of the jury's role in the selection phase. *See Poole*, 297 So.3d at 502. In performing its role during the selection phase, the jury must consider: "[w]hether sufficient aggravating factors exist"; and, "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist." Fla. Stat. § 921.141(2)(b)2.a-b. After considering whether sufficient aggravating factors exist and whether the aggravating factors outweigh the mitigating circumstances, the jury must recommend to the trial court "whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death." Fla. Stat. § 921.141(2)(b)2. If the jury recommends death, then the trial court may impose either a death sentence or a sentence of life imprisonment without the possibility of parole. Fla. Stat. § 921.141(3)(a)2. If, however, the jury recommends a sentence of life without the possibility of parole, then the trial court can only impose a life sentence. Fla. Stat. § 921.141(3)(a)1.

III.

Petitioner's Death Sentence Does Not Violate Due Process

Petitioner asks this Court to address whether her death sentence violates the Due Process Clause of the Fourteenth Amendment. *See* Petition, p.28 (Arguing that application of a State court decision to Petitioner's case "constitutes a federal *ex post facto* and due process violation."). Respondent does not address Petitioner's Ex Post Facto Clause argument because that Clause applies to legislative enactments, not judicial decisions. *See Rogers v. Tennessee*, 532 U.S. 451, 456 (2001), quoting *Marks v. United States*, 430 U.S. 188, 191 (1977) ("As the text of the [Ex Post Facto] Clause makes clear, it 'is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government.'").

As to the Due Process Clause argument, Petitioner raises a *Bouie* claim — that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operate[d] precisely like an ex post facto law" in her case. *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964). According to Petitioner, the Supreme Court of Florida committed a *Bouie* violation when, in deciding *Poole*, it "retroactive[ly] rece[ded] from *Hurst v. State*." Petition, p.29. Petitioner characterized the holding of *Poole* as a "volte-face" from the holding of *Hurst v. State*. Petition, p.1.

Unrecognized by Petitioner, *Bouie* does not apply to her case because this Court's decision protects against the "deprivation of the right of fair warning." *Bouie*, 378 U.S. at 352 ("There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and

retroactive judicial expansion of narrow and precise statutory language."); *see also Rogers*, 532 U.S. at 459, citing *Bouie*, 378 U.S. at 351, 352, 354-55 ("[The] rationale [of *Bouie*] rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct."); *Rose v. Locke*, 423 U.S. 48, 50 (1975) ("All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.").

By the time the Supreme Court of Florida decided both *Hurst v. State* and *Poole*, Petitioner's conviction and death sentence had already been affirmed on appeal. *See Brown*, 143 So.3d at 408 ("[W]e affirm Brown's conviction and sentence of death."). Therefore, neither of those decisions could unexpectedly broaden, prior the commission of the crime, a previously definitive and precise statute. *See Bouie* at 347 ("... where the construction unexpectedly broadens a statute which on its face had been definite and precise"). Therefore, *Bouie* does not apply.

Furthermore, Petitioner fails to demonstrate any harm from the Supreme Court of Florida's decision to recede from *Hurst v. State*. In Petitioner's case, the jury unanimously recommended a sentence of death. *See Brown*, 143 So.3d at 400. If the Court had applied *Hurst v. State* and its progeny to Petitioner's Sixth Amendment claim, then any *Hurst v. Florida* error would have been found harmless anyway — precisely because the jury unanimously recommended a sentence of death. *See, e.g.*, *Taylor v. State*, 246 So.3d 204, 206 (Fla. 2018) ("This Court has consistently relied on

Davis [*v. State*, 207 So.3d 142 (Fla. 2016),] to deny *Hurst* relief to defendants who have received unanimous jury recommendations of death."). Thus, even under *Hurst v. State*, any Sixth Amendment error would have been found harmless in Petitioner's case; consequently, the decision to recede from *Hurst v. State* in no way harmed Petitioner.

Finally, any attempt by Petitioner to compare the recent turnover on the Florida Supreme Court to the sinister type of "regime change" referenced in *Calder v. Bull*, 3 U.S. 386 (1798), is unpersuasive, at best. Petition, pp.28-29 n.47 (citing to recent decisions by the Supreme Court of Florida as an example of "regime change"); *see also id.* at 9 ("a substantially reconstituted Florida Supreme Court overruled *Hurst v. State*...."); *see also id.* at 28-29, citing *Calder*; *see also Calder* at 399-400. In *Poole*, the Supreme Court of Florida did not overrule this Court's decision in *Hurst*; rather, it simply corrected an erroneous interpretation of that precedent.[10] *See Poole*, 297 So.3d at 508.

This case presents no constitutional question or controversy worthy of this Court's review. Certiorari should be denied.

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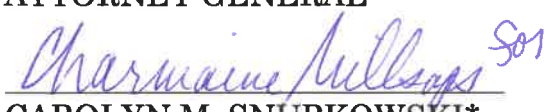
[10] Because "[*Hurst v. State*, 202 So.3d 40 (2016),] was based on a mistaken view of what constitutes an element," *id.* at 32a, the Florida Supreme Court receded from that decision "except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Poole*, 297 So.3d at 508. This interpretation places Florida with the overwhelming majority of state and federal courts which have addressed the scope of *Hurst* as well as in line with this Court's subsequent decision in *McKinney*. *See, e.g.*, *State v. Mason*, 108 N.E.3d 56, 64, 65 (Ohio 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principal offense and any aggravating circumstances" and that "[w]eighing is *not* a fact-finding process subject to the Sixth Amendment.") (emphasis in original) (string citation omitted); *Underwood v. Royal*, 894 F.3d 1154, 1184-86 (10th Cir. 2018) (holding that the Court's decision in *Hurst v. Florida* was limited to aggravating circumstances and did not extend to mitigating circumstances or weighing).

CONCLUSION

Because no meaningful constitutional question has been presented, Respondent submits that this Court should deny review of the instant case.

Respectfully submitted,
ASHLEY MOODY
ATTORNEY GENERAL



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